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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 239

ALVIS MAYNARD, ADMINISTRATOR OF MARY A. RONAN, DECEASED, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 240

JOHN B. VARNEY, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 241

J. M. SMITH AND A. B. SCOTT, PETITIONERS,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 242

A. G. RUTHERFORD, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WELLS GOODYKOONTZ,
RANDOLPH BIAS,
Counsel for Petitioners.

WILLIAMSON, WEST VIRGINIA.

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PETITION FOR WRITS OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of said Court:

The petitioners respectfully represent that these causes were heard together and decided in a single

opinion by the Circuit Court of Appeals, and therefore they unite in this single petition and the supporting brief.

A.

Summary Statement of the Matter Involved.

1. Pricy A. Varney was the mother of Nancy J. Varney, and under the will of the husband of the former and father of the latter Pricy was given a life estate in realty, and at her death Nancy was given a life estate in the same realty. Therefore the same property is involved.

2. In the first three of these cases both women are endorsers on the notes upon which the claims in bankruptcy are proved; and in the last of the cases Pricy is the maker, and Nancy the endorser, of the note.

3. On August 3, 1925, both women filed voluntary petitions in bankruptcy, and were adjudged bankrupts.

4. On August 18, 1925, each of the petitioners filed proof of claim with the referee in bankruptcy, and the claim of each was allowed (R. 6-15-24-34).

5. The claim of Maynard (administrator of the estate of Ronan) was based on a note of $3,000.00, dated October 3, 1924, maturing one year from date, made by Ferd H. Varney, payee W. P. T. Varney, and endorsed by both bankrupts; that of John B. Varney is based on a note of $3,000.00, dated October 3, 1924, maturing two years from date, made by Ferd H. Var-

ney, payee W. P. T. Varney, and endorsed by both bankrupts; that of Smith and Scott is based on three notes of $2,400.00 each, all dated October 3, 1924, maturing one, two, and three years from date, all made by Ferd Varney, payee, W. P. T. Varney, and all endorsed by both bankrupts; that of A. G. Rutherford was based on two notes, one of $38,000.00, afterwards attacked by the trustee, re-examined and expunged, as hereinafter noted, and one of $15,000.00 dated September 25, 1924, maturing one year from date made by the bankrupt Pricy and endorsed by the bankrupt Nancy (and by another) with W. P. T. Varney as payee (R. 6-15-23 and 24 and 33).

6. The two notes of Rutherford were set up in a single proof and allowed as a single claim. Thereafter the trustee filed exceptions to the note for $38,000.00 and moved to exclude it from the claim, twice amended his petition, but did not in the original or amended petition except to the $15,000.00 note. The referee, district court, and Circuit Court of Appeals, each in order, held the $38,000.00 note an invalid claim, sustained the exceptions thereto by the trustee and finally disallowed that part of the claim based thereon (R. 34). This petition therefore relates only to the note for $15,000.00.

7. All the notes were signed in Kentucky, where bankrupts lived, made payable at a bank in West Virginia, where all the claimants live except John B. Varney (who lives in Kentucky), and the petitions were filed, and adjudications made in the District Court for the Eastern District of Kentucky.

8. In February, 1926, a dividend of ten per centum was declared and paid on each of the claims from the estate of Pricy A. Varney—the payment on the Rutherford claim being limited to the $15,000.00 note, as the petition to expunge the $38,000.00 note was then pending.

9. On May 13, 1927, the Circuit Court of Appeals for the Sixth Circuit in First National Bank *v.* Elliott, 19 F. (2nd) 426, rendered a decision, without precedent or parallel, holding that a note not due when the petition in bankruptcy is filed by an endorser thereon is not provable against the estate of a bankrupt endorser.

10. On July 25, 1927 (R. 6), the trustee filed petitions in each of these cases to expunge all the claims in both estates, basing his petitions on the decision aforesaid, and seeking to explain and excuse his delay, because of the pendency of that case—which case arose from the bankruptcy of these two women.

11. In the case of Maynard, administrator of Ronan, the note upon which claim is based matured October 3, 1925, precisely two months after the petition in bankruptcy was filed, was duly presented for payment, payment refused for dishonor, and the note protested in due form for non-payment and notice given the bankrupts, the endorsers (R. 6).

12. In the case of John B. Varney, the note matured on October 3, 1926, fourteen months after the petition in bankruptcy was filed, and since no exceptions had been taken by the trustee, and no motion

to expunge had been made, the claim had been allowed, and a dividend thereon paid, and the creditor (petitioner here) believing no exceptions could be taken if not taken within one year from the time the petition in bankruptcy was filed, this note was not withdrawn from the files of the referee and presented for payment and protested for non-payment (R. 16).

13. In the case of Smith and Scott, based on three notes for $2,400.00 each, all dated October 3, 1924, maturing in one, two, and three years from date, the first and third were duly protested, the first because the twelve months within which exceptions could and should have been taken had not expired when the note matured; the third because before it matured the petition to expunge had been filed. But the second of these notes, that maturing two years from date, maturing fourteen months after the petition in bankruptcy was filed, and before the petition to expunge was filed, was not protested, to bind the endorsers, the bankrupts (R. 25).

14. In the case of Rutherford, there were at first two notes, one of $38,000.00 which was attacked on other grounds by a petition to expunge, which petition was twice amended, and which related alone to this note of $38,000.00, which was finally expunged, and one of $15,000.00, with which alone we are here concerned. This note was dated September 25, 1924, matured one year from its date, or one month and twenty-two days after the petition in bankruptcy was filed.

At its maturity it was presented for payment, payment not made, regularly protested for non-payment and notice of protest given, and an amended proof of claim filed, showing these facts (R. 37).

15. W. P. T. Varney and Ferd. H. Varney were hopelessly and wholly insolvent at the time the petitions in bankruptcy were filed, and this fact was known to the bankrupts at the time (R. 15-25-35).

16. The referee granted the prayer of the petition to expunge in the first three cases and refused the prayer to expunge in the Rutherford case. The trial judge reversed the referee in the first three cases and affirmed him in the Rutherford case, thereby holding the claims in all four cases valid, and provable. The Circuit Court of Appeals reversed the trial court, and denied recovery, in all four cases.

B

Reasons Relied on for Allowance of Writs

1. The Circuit Court of Appeals has rendered herein a decision in conflict with the decisions of four other Circuit Courts of Appeals on a parallel state of facts.

2. The Circuit Court of Appeals has decided an important question of general law—the law of bankruptcy—in a way probably untenable and in conflict with the weight of authority.

3. The Circuit Court of Appeals herein has decided an important question of Federal law which has not been, but should be, settled by this court.

4. The Circuit Court of Appeals has herein decided an important Federal question in a way probably in conflict with applicable decisions of this court.

There is presented herewith a supporting brief, showing more fully petitioners' views on the questions involved.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the records and all proceedings in the cases numbered and entitled on its docket, No. 5456, W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, Appellant, *v.* Alvis Maynard, Administrator of Mary A. Ronan, Appellee; No. 5457, W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, Appellant, *v.* John B. Varney, Appellee; No. 5458, W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, Appellant, *v.* J. M. Smith and A. B. Scott, Appellees; and No. 5459, W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney, Appellant, *v.* A. G. Rutherford, Appellee; and that the said judgments of the Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the

premises as to this Honorable Court may seem meet and just. And your petitioners will ever pray.

Given under our hands, this, the 16th day of July, 1930.

ALVIS MAYNARD,
Administrator of Mary Ronan,
By RANDOLPH BIAS,
Counsel for Petitioner.

JOHN B. VARNEY,
By RANDOLPH BIAS,
Counsel for Petitioner.

J. M. SMITH and A. B. SCOTT,
By RANDOLPH BIAS,
Counsel for Petitioner.

A. J. RUTHERFORD,
By WELLS GOODYKOONTZ,
RANDOLPH BIAS,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

The opinion of the Circuit Court of Appeals for the Sixth Circuit has not at this time been officially re-

ported. It was rendered and filed on April 18, 1930, and is copied at page 43 of the record.

II.

Jurisdiction.

1. The date of the judgments to be reviewed is April 18, 1930 (R. 41-42-43).

2. Petitioners in all four cases claim the debts of petitioners, all being based on notes of which the bankrupts were endorsers, were, and are provable debts (R. 6-15-23 and 33). The Circuit Court of Appeals reversed the trial court (Eastern District of Kentucky) and by its judgments (R. 41-42-43) and its opinion (R. 43) held that none of the debts were provable, thereby, in effect, expunging the claims and denying recovery on all of them.

3. The jurisdiction of this court is invoked under the provisions of 28 U. S. C. A., Sec. 347 (*a*) and 11 U. S. C. A. Sec. 48 (*c*).

4. The following cases sustain jurisdiction herein:

In re Watts, 190 U. S. 1;
Dunbar *v.* Dunbar, 190 U. S. 340;
Williams *v.* United States Fidelity & Guaranty Co., 236 U. S. 549.

III

Statement of the Cases.

It is believed that a full statement of the essential facts in all four cases is contained in the petition,

and in the interest of brevity, this statement will not be here repeated.

IV

Specification of Errors.

1. The Court erred, in all four cases, in holding a note not due when the petition in bankruptcy was filed is not a provable debt against the estate of the bankrupt endorser.

2. The Court erred, in the cases of Maynard, Smith and Scott, and of Rutherford, in holding that the notes which matured in less than one year after the petitions in bankruptcy were filed, and which at maturity were regularly protested and notice of protest duly given the bankrupt endorsers, were not provable debts against the estates of the bankrupts. (At the time of these proceedings below proof of debt could be made within twelve months from the filing of the petition in bankruptcy.)

3. The Court erred, in all four cases, in holding a trustee in bankruptcy, may at any time before the estate is closed (even two years after proof of debt and eighteen months after payment of dividends) regardless of the equities, obtain reconsideration of an allowed claim, based on a note not matured when the petition in bankruptcy was filed, and have the claim rejected and disallowed.

4. The Court erred, in the case of John B. Varney and as to one of the notes in the case of Smith and

Scott, in holding a note not maturing within one year from the time the petition in bankruptcy was filed by the endorser, (and which note was not protested at maturity because no attack had been made against it, and a dividend had been paid on it) might be successfully attacked by a petition to reconsider and expunge, such latter petition being filed twenty-three months after proof of debt and eighteen months after dividend paid thereon.

5. The Court erred in the Rutherford case in this: (*a*) the claim was based in part on a note for $15,000.00 which matured in less than two months after petition in bankruptcy was filed, was regularly protested and notice of dishonor given and an amended proof filed showing this; and (*b*) based partly on another note, which latter note was successfully attacked by motion and petition to expunge, which petition was twice amended (but in no wise referred to or attacked the note for $15,000.00) and heard and decided, in order, by the referee, the district court and the circuit court of appeals; after all of which, and two years after petition in bankruptcy was filed, twenty-two months after the maturity of the note, and eighteen months after a dividend was paid on it, the trustee attacked this note by a petition to expunge, which petition was denied by the referee and by the district court, but which the circuit court of appeals granted, thereby expunging the claim.

V.

ARGUMENT.

Summary of the Argument.

Point A. The decision is in conflict with, and directly opposite from, the decision of four (the Third, Fourth, Second, and Ninth) other circuit courts of appeal on the same matter. Mock *v.* Market St. Nat. Bank, 107 F. 897; Cobb *v.* Overman, 109 Fed. 65; *In re* Phillip Semmer Glass Co., 135 F. 77; Colman Co. *v.* Withoft, 195 F. 250.

Point B. The decision is of an important question of the law of bankruptcy, is untenable and in conflict with the weight of authority. Whitwell *v.* Wright, 130 N. Y. Supp. 1065; Manheim *v.* Loewe, 173 N. Y. Supp. 260; James Dunlap Carpet Co., 163 F. 541; *In re* Smith, 146 F. 923; *In re* Buzzini, 183 F. 827; *In re* Sweeney, 195 F. 250; *In re* Amdur Shoe Co., 13 F. (2nd) 147; *In re* Shatz, 251 F. 351; *In re* Letchworth, 19 F. 873; *In re* Henry & Linderman, 238 F. 639; Loveland on Bankruptcy (Third Edition) 351; Collier on Bankruptcy, Vol. 2, pp. 1399-1400; Remington on Bankruptcy, Vol 2, Sec. 777, p. 165.

Point C. The question here decided by the Circuit Court of Appeals, apparently has never been decided by this court; and is one of such general and far-reaching importance as should be settled by this court.

Point D. While this court has never decided the precise question here involved, upon reason and by an-

alogy, it has decided the question, and the decision of the circuit court of appeals herein is in conflict with those decisions. Dunbar *v.* Dunbar, 190 U. S. 340; Martin *v.* Cole, 104 U. S. 30; Riggin *v.* Magwire, 82 U. S. 549.

Point E. If it can be found the trustee had the right in any case to move to expunge the claims because based on notes not due when endorsers' petitions in bankruptcy were filed, the trustee in these cases waited too long, was guilty of such laches as that he could not be allowed to have expunged these claims. 21 *C. J.*, Secs. 211 and 238; Blanke M. & S. Co. *v.* Winnifield L. & I. Co., 290 F. 180; Loveland (Third Ed.) p. 410; Collier, Vol. 2, sec. 57, p. 1173.

Point F. In the Rutherford case, in addition to all the other reasons against granting the prayer of the petition to expunge the claim which are hereinbefore set out, is the plea of *res judicata*, which alone was ample ground for denial of the prayer and motion to expunge. Bates *v.* Bodie, 245 U. S. 520; Cromwell *v.* Sac County, 94 U. S. 351; Virginia-Carolina Chemical Co. *v.* Kirven, 215 U. S. 252; Northern Pacific Railway Co. *v.* Slaght, 205 U. S. 122.

POINT A.

The decision is in direct conflict with the decisions of four other circuit courts of appeal—and supported by the decision of no other circuit.

Until the Circuit Court of Appeals for the Sixth Circuit rendered its decision in First National Bank *v.*

Elliott, 19 F. (2nd) 426, no court, so far as we can learn, had ever held that a note not due when the endorser filed a petition in bankruptcy could not be proved against the estate of the bankrupt endorser. Having so decided that case, the court in the instant case felt bound by that decision and, therefore, reversed the trial court in all these cases, the trial court having held all the notes involved herein as provable.

The same precise question has been considered and decided by the circuit courts of appeal for the Third, Fourth, Second and Ninth circuits, *and in each instance the decision was exactly opposite the decision here.*

In Moch *v.* Market St. Nat. Bank, 107 F. 897, the court for the Third Circuit, after quoting at length the 63rd section of the bankrupt act (of 1898) said:

> "Clearly the liability of an endorser is in the very words of this fourth subdivision * * * If it can be affirmed that such an unmatured liability is not a 'debt,' in a technical sense, certainly it is a 'demand' or 'claim' and comes, it seems to us, within the scope of the fourth subdivision of section 63 of the Act."

This opinion also examines and considers the contention made here and in First National Bank *v.* Elliott, *supra,* that a portion of subdivision 1 of this section qualifies subdivision 4 thereof, and sums up its finding:

> "The first and fourth subdivisions of section 63 are distinct provisions, and are, we think, independent of each other. We are unable to

agree to the proposition that subdivision 1 qualifies, and is to be carried down and read into, subdivision 4."

In Cobb *v.* Overman, 109 F. 65, in considering the question here involved, the Circuit Court of Appeals for the Fourth Circuit held:

> "The bond in this case is a fixed obligation, its amount definite and certain, and the same was in full force and effect at the date of the filing of the petition in bankruptcy, though the liability thereunder is payable in the future, and in stated sums. The demand is clearly one the value of which can be ascertained, and hence provable under the bankruptcy act."

The facts were the same as here, except that in that case the debt was evidenced by a bond.

In a *per curiam* opinion in *In re* Phillip Semmer Glass Co., 135 F. 77, the Circuit Court of Appeals for the Second Circuit, in deciding the provability against an endorser of an unmatured note said:

> "We concur with the Court of Appeals for the Third Circuit (Moch *v.* Market St. Nat. Bank, 107 F. 897, 47 C. C. A. 49) in the conclusion that the liability of a bankrupt endorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy."

The case considered by the court for the Ninth Circuit was a rent case, Colman Co. *v.* Withoft, 195 F. 250, but in it was examined the law as relates to un-

matured notes against bankrupt endorsers. As to this this Court said:

> "An apparent exception to the rule that contingent claims may not be proved under section 63*a* is the case of an indorser of the commercial paper of a bankrupt not due at the time of the filing of the petition, but whose liability as indorser thereafter becomes fixed. Moch *v.* Market Street Bank, 107 Fed. 897, 47 C. C. A. 49; *In re* Semmer Glass Co., 135 Fed. 77, 67 C. C. A. 551; *In re* Smith (D. C.) 146 Fed. 923. But it may be doubted whether the liability of an indorser in that class of cases is in any true sense contingent. The extent of his liability is at all times known, for it is measured by the note itself. Upon the adjudication of bankruptcy it would seem that there is an end to the contingency that the bankrupt himself may pay the note, and that there remains between that date and the maturity of the indorser's liability nothing but a question of time. But in any view of these decisions, they are not applicable to the present case, for here there was a contingency, not only as to the amount of the liability, but as to its existence."

It is proper here to observe that for all practicable purposes every element of contingency as to the bankrupts' liability on the notes in all four suits had been removed, because at the time the petitions in bankruptcy were filed all other parties to the notes, including the makers) were insolvent, had been adjudicated bankrupts, with less than one per centum of assets to

meet liabilities, and these facts were known to the bankrupts (R. 16-25-35).

Thus, it is seen, the decision here is in direct conflict with the decisions in four other Circuit Courts of Appeal, and is supported by the decision of no other circuit.

POINT B.

The decision is in conflict with the great weight of authority.

This is clearly shown by the cases cited in the summary preceding this argument. It is significant the opinion here complained of cites a single case in its support, and that an earlier decision of the court citing it.

We would invite the court's consideration of the cases cited in the summary, largely from the Federal District Courts, in addition to those above referred to from the Circuit Courts of Appeals.

Apparently all the textwriters on the subject of bankruptcy unite in disagreeing with the decision here. Opinions of textwriters of course lack the effect of opinions of courts, but it is to be assumed those authors having, and professing to have, peculiar technical knowledge of a given branch of the law have studiously examined the statute and court decisions thereon.

Here is the conclusion of three of the best known of these textwriters.

Loveland (3rd Ed. 351) says:

> "In case the bankrupt is the person secondarily liable as an endorser or a surety, it is nec-

essary that the liability has become absolute and fixed, as by maturity, notice, and nonpayment of the debt prior to the bankruptcy proceedings to be provable under the first clause of section 63, *but the contract of endorsement may be proved under clause four of the same section.*"

Mr. Collier says (Vol. 2, p. 1399-1400):

"Where the liability of a bankrupt as an endorser or surety does not become fixed until after the filing of the petition it is not a provable debt under subdivision *a*(1) as a fixed liability absolutely owing, but if the liability becomes fixed prior to the expiration of the time for proof of claims *it is a provable debt under subdivision a*(4) as upon a contract, expressed or implied."

Mr. Remington (Vol. 2, sec. 777, p. 165) says:

"The liability of the bankrupt as endorser or surety, upon his contract of endorsement or suretyship, is a provable debt, although default has not been made by the principal until after the filing of the petition or until after adjudication. It constitutes a demand or claim, even if not a debt."

Those who hold such notes, as are here involved, not provable do so by reasoning that the Congress intended to have certain phrases of sub-division 63A1 of the Act carried down and read into sub-division A4 of that section, the phrases being "fixed liability" and "absolutely owing."

The Act says what debts are provable. The section in the Act is 63; in U. S. Code Compact Edition it is

Title Eleven, Sec. 103. The section is sub-divided into "*a*" and "*b*" and subdivision *a* has five subdivisions. That portion of it with which (and with which alone) we are here concerned reads as follows:

> "Debts of the bankrupt may be proved and allowed against the state which are * * * (4) founded upon an open account, or upon a contract express or implied."

Those who share the views of the court of the Sixth Circuit (and they are few) maintain, for some inexplicable reason, that we should borrow from sub-division A1 of this section the phrases above quoted and read them, somehow and somewhere, into subdivision A4 above quoted in full. So to hold is to say that the Congress did not know how to employ the English language and really meant something it did not say. The whole case against the provability of an unmatured note against the estate of a bankrupt endorser hangs on this strained construction of the Act. Without it there is and can be no question.

Mr. Loveland (Loveland, Fourth Edition, Sec. 294, p. 609) examines this contention and says:

> "It has been suggested that these words should be read into the fourth clause as a limitation on contract debts (citing Roth and Appel, 181 Fed. 667, and in re Swift, 112 Fed. 315). *If Congress had intended to so limit the fourth clause it would have been easy to have said so.* The fourth clause is clearly limited to debts at the time of the bankruptcy. The obligation to pay must be fixed and the amount ascertainable

at the time *although the debt may not become owing until the happening of some event.* Such claims are 'debts founded on a contract,' in which the rights of the parties are absolutely fixed as between them at the time of the filing of the petition."

POINT C.

This precise question has never been decided by this court. It should be settled by the court.

Strange to say, apparently this question has never been decided by this court. At least one case in which was involved the question was before the court, but the case was dismissed on other grounds. Since it has not been decided and the opinions of Circuit Courts of Appeals are now in conflict it is obvious the question should be finally settled by this court.

As was said by this court, in Kreitlein *v.* Ferger, 238 U. S. 21, in referring to the bankruptcy statute, "But, like them, must be considered in the light of the fact that the statute was intended for business men, and should receive not only a practical but a uniform construction." Clearly this court should, by its opinion, tell litigants, lawyers, and lower courts what is the law.

POINT D.

While this court has not decided the question, its opinions plainly indicate its decision thereon.

In at least three cases this court has rendered decisions and written opinions indicative of its holding on

this question. The first of these was Riggin *v.* Magwire, 82 U. S., 549, and since under the Act of 1841 will not be here examined at length, but is referred to for its reasoning. The second was not under the bankruptcy law at all, but was a suit on a negotiable note, and is here examined because of its definition of the contract of the parties to such an instrument, which definition definitely disposes of the contention made by those who say the contract of an endorser is not express, but contingent. The case is Martin *v.* Cole, 104 U. S. 30, and in it this court says:

> "The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not, in any proper sense, a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing. * * * All its terms are certain, fixed, and definite, * * *. So that the mere name of the indorsers, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full."

The last of the three cases here to be considered is Dunbar *v.* Dunbar, 190 U. S. 340. This was a bankruptcy case, and in its opinion we maintain the court said that which when applied to this case would support the contention here made. The court said:

> "Conceding that the Bankruptcy Act provides for discharging some classes of contingent demands or claims, this is not, in our opinion,

such a demand. Even though it may be that an annuity dependable on life is a contingent demand within the meaning of the Bankruptcy Act of 1898, yet this contract, so far as regards the support of a wife, is not dependable upon life alone, but is to cease in case the wife remarries. Such a contingency is not one which, in our opinion, is within the provision of the Act, because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood."

The case the court then considered was one in which the husband by contract had agreed to pay alimony to his wife for life or so long as she remained unmarried. The Supreme Court said that the annuity part was perhaps good in spite of the contingency, but that the impossibility of saying how long a woman should remain unmarried was too great, and that, therefore, this was not a debt provable against the husband's estate in bankruptcy. How could the court have decided otherwise? We have annuity tables by which we are able to estimate the value of an annuity, but who has yet devised or invented a table to say how long any woman will remain unmarried? She may marry tomorrow, or next year, or never; and, of course it would require the rankest sort of guess to remove the contingency as to this. Therefore, this court properly held that this was not a provable debt, and was not discharged by the bankruptcy of the husband; and that, therefore, he must continue to pay the money to the wife. This case is far from being the case we now consider.

In this (the Dunbar) case Mr. Justice Peckham commented on Moch *v.* Market Street National Bank, *supra,* but did not disapprove of the holding of the Circuit Court of Appeals for the Third Circuit in that case. On the contrary, inferentially the court approved of the holding in the Moch case, as will be noticed by this sentence: "These cases" (referring to the Moch case and the case of Cobb *v.* Overman, 109 Fed. 65) "it will be seen, do not come within the principle of the case at the bar."

Observe further that in the Dunbar case this court said:

> "We think the contract, so far as it related to the payment to the wife during her life of widowhood, was not a contingent liability provable under the Act of 1898."

The language so employed by the court tells us again that at least some contingent liabilities are provable, which entirely refutes the contention now made that a contingent debt may not be proved against the bankrupt.

We submit the logic of this decision, when applied to the instant cases, calls for reversal of the circuit court of appeals, and affirmance of the bankruptcy court.

Point E.

Laches.—The trustee delayed too long in presenting his petition to expunge the claims, and the equities forbid such course, even if he might properly have so presented the matter at an earlier date.

Realizing he had delayed too long in presenting his petition to expunge the claims attacked, the trustee in his petition sought, by what savors of a plea of confession and avoidance, to excuse that delay. This plea is, other litigation pending (R. 6-15-24-34) the litigation in question being First National Bank *v.* Elliott, *supra.* The excuse is unavailing. The fact A sues B does not excuse nor mitigate his delay in suing C—in the absence of an agreement. The governing principle is thus stated:

> "It has been held that where the question in controversy is involved in a suit pending between parties, plaintiff may wait a reasonable time for a decision of that suit before bringing his own action, *where he and his adversary agree to abide by that decision,* and he is not guilty of laches in failing to prosecute an infringer of a right pending his prosecution of other infringers of the same right; but other cases hold that delay pending the decision of a test case is not excusable in the absence of an agreement to abide by the event."
>
> 21 *C. J.*, Sec. 238, page 242.

Observe that in order to escape laches there must be an agreement to abide by the decision in the other

action, and that in the absence of such agreement the pending action is not a test case, the outcome of which must be awaited before the other action is brought. Of course if these claimants had agreed with the trustee that the trustee might withhold his objections to these claims and delay filing petitions for reconsideration until the suit of the First National Bank of Pikeville against the trustee was decided, then the delay would be excused and there would be no laches; but there was no such agreement, and there is no contention that there was such an agreement.

How about the equities? Within less than a month after the petitions of the bankrupts were filed the claimants proved their claims. They were allowed without objection. Within two months after the petitions were filed the notes upon which the claim in Nos. 5456 and 5459 and one note in 5458 were based matured, were protested for nonpayment, and notices of dishonor given. They then and there became definite fixed liabilities absolutely owing by the bankrupts—if, under any circumstances it could be held there was not fixed liability absolutely owing when petitions were filed.

> "Subject to the provisions of this act, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder."—Uniform Negotiable Instruments Law, sec. 84.

The instruments were dishonored for nonpayment, and thereupon immediately right of recourse in favor

of the claimants and against the bankrupts (they being endorsers and secondarily liable) accrued.

Yet, although beyond any question these now were debts of the bankrupts in definite amount absolutely owing, no objection was raised and no petition filed to reconsider the claims by the trustee until approximately two years after commencement of the bankruptcy proceedings. The equities forbid this. If in fact a petition to reconsider was to be filed it should have been filed before the expiration of one year from the time proceedings commenced, that claimants might, if they could do so, meet the objections by filing amended proofs of claim, or in any other proper way.

Next, counsel contended that claimants are not prejudiced by the delay and that, therefore, laches is not imputable to the trustee.

Observe that in defining laches Pomeroy says that if a disadvantage accrue to the opposing party and this disadvantage comes from "intervention of equities or other cause it is ground for denial of the relief." Here is the intervention of the equities.

Again let us examine the definition of laches given by Corpus Juris and by it boiled out of many well considered cases, from which the definition is formulated.

> "Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in the law should have been done. More specifically, it is inexcusable delay in asserting a right; an implied waiver arising from this knowledge of existing conditions and an acquiescence in them; Such neglect to assert a

right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity; such delay in enforcing one's rights as works disadvantage to another."—21 *C. J.*, 210.

We have the neglect of the trustee to object in season, to do that in law which he should have done. He knew the conditions, and acquiesced in the situation. He neglected to assert his right until claimants were prejudiced by his delay, and he is now barred from doing what he should have done long ago. "He who remains silent when he should speak is not permitted to speak when he should remain silent."

Moreover, to permit reconsideration of claimants' claim at this juncture violates the equities in another particular. In February, 1926, six months after the commencement of bankruptcy proceedings, a dividend was declared and paid on these claims, ten per centum of each claim being paid to each claimant. Trustee's counsel says claimants are not prejudiced by this. We differ as to this. We maintain that if one asserts a claim against another and the other so recognizes the claim as not to object to it, but permits a portion of it to be paid, it is then prejudicial to the right of the claimant to later say that the sum is not owing. If you pay me money which I claim you owe me, and do it without objection or protest, then you are estopped by your own laches later to say that you did not and do not owe the money. Perhaps I have invested the money, spent it, or so used it as that it works a hard-

ship on me now to repay it. The omission to object, the remaining silent, when he should have spoken, now debars the trustee from speaking.

The trustee then invokes the bankruptcy statute which does say that claims may be reconsidered before but not after the estate has been closed. However, the statute does not say *any* claim may be so reconsidered or that *all* claims *must* be reconsidered, but simply says that before the estate is closed it *may* be reconsidered.

When may it be so reconsidered? The answer is: "According to the equities of the case." We submit that the equities of the cases deny to the trustee any rights to have the claims reconsidered. We submit a case cannot be found where a claim has been reconsidered two years after commencement of the bankruptcy proceedings and eighteen months after a dividend has been paid on a claim which has not been contested.

In the Star Spring Bed case, 265 Fed. 137, the delay was four and one-half months. In the Globe Laundry case, 198 Fed. 365, the delay was more than a year, but the court said:

> "Under Bankruptcy Act July 1, 1898, c. 541, sec. 57K, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), which provides that 'claims which have been allowed may be considered for cause before, but not after, the estate has been closed', reconsideration should be allowed as a general rule, when asked by the trustee at any time before the estate has been closed, and a delay of more than a year, without other facts appear-

ing, and where a dividend has not been declared, is not of itself such laches as to bar a re-examination."

Other facts do appear here. There has been a dividend in this case, and we submit that the necessary inference to be drawn from the Globe Laundry case is that this fact as to that claim would have caused the court there to have decided differently and to have held there was such laches as to bar re-examination.

In the Calendonia Coal Company case, 254 Fed. 742, cited in the court's opinion, the delay was fourteen months, and the court said, among other things: "Delay alone does not constitute laches; the essential element being prejudice to another person by reason of the delay complained of." Here we have the essential element; first, in that no amended proof of claim was offered after the maturity and the protest of the notes within the year, although the notes matured and were protested two months after the proceedings commenced; and, second, and more important, because the estate was being distributed by dividends and dividends were actually paid to claimants before any objection whatever was made to claimants' claims. Therefore, it is argued the facts in Caledonia Coal Company case do not support the decisions here complained of.

Let us see what would have occurred as to these claims if in fact the trustee had objected to the claims or moved their reconsideration, without being guilty of laches. If objection had been made to the claims when they were offered or at any time before the notes

matured (that is, two months after the proceedings commenced) the claim would have been withdrawn and immediately after the notes matured, were not paid, and protested, and notice of dishonor given the bankrupts—the endorsers, the claims would have then been proved; and then there could have been no question but that this was proof of debts, in definite amount, absolutely owing by the bankrupts two months after proceedings began. In this state of facts the trustee certainly would have not been in position to ask for a reconsideration of the claim.

Moreover, in the supposed case, there would have not been payment of a dividend, pending the determination of trustee's objections or petition to reconsider. Such objections were made as to other claims filed with the result that dividends were not paid thereon. But such was not the case as to the claims here being litigated. Proof was made. These claims, long ago, were allowed. No objections were offered. No exceptions were taken. The debts were fixed liabilities owing just two months after the proceedings commenced—if in fact not such when proceedings started. A dividend was paid without objection. A year passed without objection, and without petition, and now after two years have passed since the beginning of proceedings, twenty-one months after the maturity of the notes (which definitely fixed the liabilities of the endorsers, the bankrupts) eighteen months after the claimants have received part payment of their claims, comes the trustee to object. We say the objections are too late. We vigorously urge that

laches bars trustee's right to have this claim reconsidered.

Our conclusions as to this are amply supported by the best text-writers on the subject.

Mr. Loveland, quoting from Hinchel Brewing Company, 123 Fed. 942, says:

> "A trustee has been held to be barred by laches to petition for a re-examination of a claim once allowed."—Loveland, 3rd Ed., p. 410.

Mr. Collier says:

> "The application for reconsideration must be made promptly or it will be denied because of laches. The time for filing petition may be fixed by rule of the district court, which may authorize an extension of the time for good cause shown, or, if not so fixed, objections after allowance should be made within the year within which an amended proof of claim might have been filed."—Collier, Vol. 2, sec. 57 (p. 1173)

Mr. Remington says: "Reconsideration of an allowed claim will be refused when the trustee is guilty of laches" (Remington, Vol. 2, sec. 1042; p. 407). And in the supplement, November, 1925, to this volume of Remington is found excerpts from the opinion of the Circuit Court of Appeals for the Eighth Circuit, in Blanke Man. & Sup. Co. *v.* Winnifield L. & I. Co. (290 Fed. 180), which reads as follows:

> "To assure control and equitable disposition of claims, sec. 57K of the Bankruptcy Act

(Comp. Stat. 1916, sec. 9641) provides that 'claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.' This provision, obviously, was not intended to give immediate right to such reconsideration. Not only does it expressly state that such reconsideration 'may' be allowed 'for cause'; but to hold the right as absolute would be to nullify the provision in sec. 25a of the Act. (Comp. Stat. sec. 9609), which requires appeals from orders of confirmation to be taken within ten days. Also, such a view of sec. 57K would tend to delay (through repeated petitions for reconsideration and appeals therefrom) the speedy distribution of the estate which is one of the prime purposes of the Bankruptcy Law (Wiswall *v.* Campbell, 93 U. S. 347, 350, 23 L. ed. 923, 924). Therefore, we construe sec. 57K as submitting the matter of allowing reconsideration *to the sound discretion of the court.*''

There is an additional strong equity which makes even clearer the laches of the trustee as to the one note in No. 5457 and one of the three notes in No. 5458.

As shown by the record, after one year had elapsed after the filing of the petitions in bankruptcy by the bankrupts the claimant in No. 5457, and as to one of their three notes (that maturing October 3, 1926, fourteen months after petitions filed) the claimants in No. 5458, did not withdraw these notes, present them for payment, have them protested for nonpayment and

have notices of dishonor given these bankrupt endorsers. This was not done for the reason claimants believed, in fact thought they knew, if objection or motion to reconsider was to be made it must be made within twelve months—the time then allowed for proving claims—and within which time Mr. Collier says objections after allowance should be made.

The claimants in No. 5458 had protested the note maturing two months after petition filed, and then, after these petitions to reconsider were filed, duly protested the note maturing twenty-six months after bankruptcy petitions were filed.

This omission, for the reasons stated, to protest these two notes and thereby render the endorsers liable after their discharge, if in fact they are not provable against the bankrupts' estates, is another strong equity intervening to cause the unprecedented delay in the trustee to amount to laches in moving for reconsideration of the claims. If the notes are not provable in bankruptcy they are not barred by the bankruptcy and, but for this laches of the trustee in objecting, would have been protested and the bankrupts held liable therefor after their discharge. There was no protest. Therefore, the bankrupts after their discharge are not liable, and now to hold the notes nonprovable debts is to say finally to the claimants, the notes may not be collected, in whole or in part, either from the estate of the bankrupts before or after their discharge. Here is the delay that works a disadvantage and prejudices the rights of the claimants, resulting in a changed condition of the parties to which

they cannot be restored. The delay is inequitable and estops the trustee, according to Mr. Pomeroy, Sec. 1442, hereinbefore quoted.

All the equities loudly call for estoppel against the attempted assertion of the right, to re-examination and rejection, made by the trustee, in all four of these cases, but most loudly for the additional reason herein stated, as to these two notes, one each in Nos. 5457 and 5458.

POINT F.

In the Rutherford Case in addition to all the other grounds, including laches and inexcusable delay, set out in points A to E, inclusive, is the additional ground of res judicata.

There are facts and circumstances peculiar to the claim of Dr. A. G. Rutherford which give rise to two additional defenses in his behalf herein, and that is to say, and equitable defense, arising from certain facts and circumstances, and the plea of *res judicata*.

The facts and circumstances, briefly stated, are:

Rutherford filed his sworn proof of claim embracing there two items, consisting of:

(*a*) A note for $15,000.00, dated September 25, 1924, payable to the order of W. P. T. Varney, signed by Pricy A. Varney and endorsed by Nancy Jane Varney, W. P. T. Varney, and J. M. Pinson. This note represents the indebtedness involved in this controversy.

(*b*) A note for $38,000.00, dated March 26, 1925, made by W. P. T. Varney and endorsed

by Pricy A. Varney and Nancy Jane Varney, payable to Dr. A. G. Rutherford.

Both notes were embraced in the one sworn proof of claim, for a total of $53,000.00. There being no objection thereto, the claim, in its entirely, was allowed. On September 19, 1925, the trustee filed objections and petition to expunge the item of $38,000.00 from the claim of Rutherford. On January 21, 1926, the trustee filed further amendatory objections to the item of $38,000.00. This gave rise to an issue of law and fact involving Dr. Rutherford in much labor and expense.

Depositions were taken, pro and con, and a large record made up. The matter being argued, the referee, on the 30th day of April, 1926, ruled with the trustee and expunged the item of $38,000.00. Rutherford then took the matter before the district court, where extended arguments, oral and on belief, were made. The district judge having heard and considered the matter, on November 3, 1926, approved and confirmed the order entered by the referee. On November 6, 1926, upon assignments of error an appeal was granted from the judgment of the district court and the case was thereupon taken to the Circuit Court of Appeals, and there decided against Rutherford.

In relation to the foregoing litigation, Dr. Rutherford was necessarily involved in much time and expense, his expenditures including costs of travel, court costs, printing, counsel fees, and the like, including loss of time and worry.

The trustee having thus successfully eliminated from Rutherford's claim the item of $38,000.00, and encouraged by the decision of the Circuit Court of Appeals rendered in First National Bank of Pikeville *v.* Elliott, supra, did, on July 25, 1927, file his petition and move to reexamine and expunge the item of $15,000.00, remaining in the proof of claim.

This claimant filed an answer to the proceedings, wherein he set forth the facts and made argument to the effect:

(*a*) That the note was the basis for a provable claim because it fell due on September 24, 1925, seven weeks after petition in bankruptcy was filed.

(*b*) That it would be grossly inequitable, after the expiration of the time within which claims might be proven, to reconsider the allowance of the claim under Section 57K of the Act of May 27, 1926, no proper cause or good reason, or equities, for such action appearing.

(*c*) That the conduct of the trustee by remaining silent and failing to move for a period of two years after the claim was proven and allowed, and the time for filing an amended or new proof of loss had expired, was contrary to the rules of equity and the dictates of natural justice.

(*d*) That the delay of the trustee had prejudiced the rights of the claimant, and his petition is barred by lapse of time (laches).

(*e*) That the note in question is in legal effect the joint note of the three Varneys, Nancy Jane, Pricy A., and W. P. T. that the liability of each of them was fixed and definite, and in nowise contingent or unliquidated at the time of the filing of the proof of loss.

(*f*) That Pricy A. Varney and Nancy Jane Varney were adjudged bankrupts simultaneously, and W. P. T. Varney, the payee of the note, before said petitions were filed was notoriously and hopelessly insolvent and bankrupt, which was known to Pricy A. Varney and Nancy Jane Varney; that, therefore, the note was, in fact, at the time of the filing of the petition, a fixed liability absolutely owing.

(*g*) That petitioners' objection against the claim because the liability on the endorsement did not mature until one month after the adjudication, was without merit for the reason that it became a fixed liability on its due date, within a year after bankruptcy.

(*h*) Because of the knowledge of the bankruptcy and the inability of the payee of the note to pay one per cent of his liabilities, the bankrupts knew at the time their petitions were filed that they would be required to pay, in so far as their assets would go, said note, it was therefore a fixed liability absolutely owing.

(*i*) That the trustee had filed exceptions to and petition to expunge the claim based on the

$38,000.00 note, and had filed none on the $15,000.00 note; that this lulled the claimant to security, and if this had not been done, he would have filed an amended or new proof of claim as to the $15,000.00 note.

(*j*) By an amended answer, Rutherford further pleaded:

A. That the long delay—of nearly two years—was and is prejudicial, and therefore inequitable to him, for the reason that he was and has been deprived of his opportunity to bring an action against the said bankrupts in their individual capacity, and thereby to have secured an early judgment as against them, and a priority of lien over such property as they may have acquired since their adjudication in bankruptcy; provided, as of course, that the petitioner's proposition of law to the effect that the claim was not provable, be well taken in law which position of the said trustee the said Rutherford says is not sound.

B. That it would be prejudicial, and therefore inequitable, to allow a reexamination of the claim for $15,000.00 at this late day for the reason that it would involve the said Rutherford in double expense and cost in relation to what would be practically two separate proceedings—the case involving the note of said Rutherford for $38,000.00 being now already in the Circuit Court of Appeals.

The answer further set forth in much detail, as will appear from the printed record (in No. 5459, page 8, *et seq.*) the facts and circumstances incidental to the litigation in both cases.

Rutherford thereupon filed an amended proof of claim, protest duly made, with copy of the note and certificate of protest, and it was stipulated between counsel that the $15,000.00 note was protested in proper time and in due form.

It was also stipulated before the referee that Nancy Jane Varney at the date of adjudication in bankruptcy had personal knowledge of the insolvency of the maker and all endorsers of the note in question, and that nothing could be realized by the claimant then or since from any obligor, except such payment as might be obtained through dividends from the estate of the maker, Pricy A. Varney.

The matter was submitted on the petition, answer and stipulation with the result that the referee held with Rutherford by refusing to grant the petition and motion of the trustee to reexamine and expunge the claim; thereupon the trustee filed petition for review and took the case before the district court.

The matter having been thoroughly argued on briefs and orally before Judge Cochran, the latter, on June 4, 1929, pronounced and entered judgment affirming the action of the referee and confirming the order entered by the latter as of December 17, 1927.

Whereupon the trustee prosecuted an appeal to the Circuit Court of Appeals.

Upon this record, in relation to Rutherford's case there arises three questions of law. We contend as follows:

First. That according to the letter and spirit of the Act of Bankruptcy, the claim, being provable, was properly allowed under the rule established in the Moch case, and numerous other decisions in harmony with the ruling in the Moch case, and as supported by the views of eminent text-writers on the subject of the laws appertaining to bankruptcy.

Second. That the facts and circumstances, attending the procedure in relation to the note of $38,000.00 gave rise to an equity in favor of this claimant. Such equity forbids the reopening of the matter. Section 57K of the Bankruptcy Act provides as follows: "Claims which have been allowed *may be reconsidered* for cause and reallowed, or refused in whole or in part *according to the equities of the case,* before but not after the estate has been closed." The trustee slept for nearly two years on his rights, and during the meanwhile paid a dividend of ten per cent on the claim. The fact that such dividend was paid did not alter the case, except for the fact that it shows an acquiesence in the former action of the referee in allowing the claim. No objection had been interposed to that item. If it had been stricken out as a nonprovable claim, Rutherford could have proceeded to judgment and thereby secured an early priority as against any estate of the bankrupts which might remain after payment

of the debts, or estate which the bankrupts might thereafter acquire. The main fundamental grounds which forbade the referee from reexamining the claim lay in the fact that both items should have been attacked at the same time, and thereby have admitted of the questions being settled as to both notes in the same litigation. By such delay the trustee has involved Rutherford in double trouble and expense. It is unreasonable and unjust to the claimant and equity would seem to forbid such action upon the part of the trustee. There was no stipulation, express or implied, to the effect that the procedure as to the $15,000.00 note should be held in abeyance awaiting action of the courts in relation to the case of the Bank *v.* Elliott. It was never suspected by Rutherford or his counsel that the law enunciated in the Moch case would ever be challenged. The use of the words "may be reconsidered" and "according to the equities of the case" incorporation in Section 57K, clearly invests the referee with a certain discretionary power, and the fact that in this case the referee exercised it favorably to the plaintiff is to his credit, and the action of the district judge in approving and confirming the action of the referee, in respect to that ruling, was fully justified, and, under the circumstances, could not have been otherwise under the law. *In re* Eldorado Ice & Coal Co., 290 F. 180.

The Circuit Court of Appeals for the Third Circuit in the case last cited, after quoting from the provision of the pertinent statute, said:

> "This provision, obviously, was not intended to give an undeniable right to such reconsidera-

tion. Not only does it expressly state that such reconsideration "*may*" be allowed "for cause", but to hold the right as absolute would be to nullify the provision in section 25a of the act (Comp. Stat. sec. 9609a), which requires appeals from orders of confirmation to be taken within ten days. Also, such a view of section 57k would tend to delay (through repeated petitions for reconsideration and appeals therefrom) the speedy distribution of the estate which is one of the prime purposes of the Bankruptcy Law (Wiswall *v.* Campbell, 93 U. S. 347, 350, 23 L. Ed. 923). Therefore, we construe section 57k as submitting the matter of allowing reconsideration to the sound discretion of the court."

Third. The doctrine of *res judicata* applies to this case with all its force. The judgment in the former case concludes the parties, not alone to what was therein involved, but, also as to such other matters and things as might have been adjudicated therein. Equity does not take two bites at a cherry. The rules of the law of bankruptcy are analagous to those appertaining to equity. Let us suppose the case of a vendor of real property bringing a suit to enforce the collection of two notes given for purchase money, and the defendant by answer setting up a defense as to one of the notes, and, finally, after review in an appellate jurisdiction sustaining that defense—in that case—would that defendant, after the cause had been remanded be allowed to file an amended answer and to contest the validity of the other note? Other sup-

posed cases of a similar nature will immediately occur to the mind of the court.

What was said under Point E applies here with the same force and effect as to the laches or unequitable delay.

As to the claim here made the prayer of the trustee's petition to reconsider and expunge the Rutherford claim should be denied because of the fact the trustee had already once attacked this claim (as to the note for $38,000.00) and litigated this, by successive steps, to a final determination in favor of the trustee, we cite the cases set out in the summary of the argument under this point (F).

The case of Bates *v.* Bodie, 245 U. S. 520, decided by this court in 1918, is illustrative of the principle involved and of its application. Therein the court says:

> "And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided, but of what might have been decided."

Bear in mind that what was there litigated was a portion of this same identical claim—Rutherford's debt comprising two notes, one for $38,000.00 which was there litigated and one for $15,000.00 attacked herein.

What the court said in Bates *v.* Bodie it has been saying for years, as is illustrated by the following from

Virginia-Carolina Chemical Co. *v.* Kirven, 215 U. S. 252:

> "It is established that the bar of a judgment in another action for the same claim or demand between the same parties extends to not only what was pleaded or litigated in the first action, but what might have been pleaded or litigated. If the second action is upon a different claim or demand, the bar of the judgment is limited to that which was actually litigated and determined. Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; Northern P. R. Co. *v.* Slaght, 205 U. S. 122, 51 L. ed. 738, 27 Sup. Ct. Rep. 442."

Conclusion.

The construction and interpretation given the statute by the Circuit Court of Appeals operates to defeat the benign purpose of the Bankruptcy Act, in this: It turns away empty-handed one class of creditors to the distinct advantage of another class. The decision of the court below, if it be the law, also operates an injustice upon the bankrupt. Seldom it is, that a bankrupt is not an accommodation endorser of negotiable paper which does not mature until after petition has been filed. If possible, the court should give a statute that construction which will best carry out the primary intent and purpose of the legislative body, and to the end that the statute may operate equitably upon all parties concerned.

For these considerations, and the need of uniformity in the decisions of the several Circuit Court of Appeals, on the law of bankruptcy, we respectfully insist

that the writs, here prayed for, should issue and that upon final hearing the judgments of the Circuit Court of Appeals for the Sixth Circuit should be reversed, and those of the district court be affirmed.

Respectfully submitted,

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WILLIAMSON, WEST VIRGINIA, *June* 16, 1930.